

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**UNITED RENTALS (NORTH AMERICA), INC.<sup>1</sup>**

**Employer**

**and**

**Case 28-RC-6195**

**INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 953, AFL-CIO<sup>2</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Petitioner seeks an election in a unit comprised of approximately 16 full-time and regular part-time employees who work at or out of the Employer's facility located at 2800 University Avenue, Albuquerque, New Mexico. The Petitioner seeks to include in the unit the classifications of mechanics; tractor-trailer and truck drivers, who are otherwise known as drivers; customer service associates, who are also called yard persons; and parts associates. Contrary to the Petitioner, the Employer urges that any unit found appropriate must also include approximately six additional employees: the dispatcher; the senior yard person, who is also known as the senior customer service associate and yard foreman; sales coordinators, who are also called inside salespersons; and the senior sales coordinator.

Based upon the reasons more fully set forth below, I find that the unit sought by the Petitioner is appropriate for purposes of collective bargaining and should include mechanics, drivers, customer service associates or yard persons, and parts associates, based primarily on the strong community of interest these employees share. I find that the sales coordinators, senior sales coordinator, and dispatcher should be excluded from the unit because they do not share a community of interest with the petitioned-for unit. I further find that the senior yard person and the dispatcher are supervisors as defined in the Act and should be excluded from the unit on this basis.

**DECISION**

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

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<sup>1</sup> The name of the Employer appears as stated at the hearing.

<sup>2</sup> The name of the Petitioner appears as stated at the hearing.

**1. Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

**2. Jurisdiction:** The Petitioner is a Delaware corporation engaged in the rental of equipment to individuals and companies at various locations in the United States, including a facility in Albuquerque, New Mexico. The parties stipulated, and I find, that during the 12-month period preceding June 11, 2003, the Employer had gross revenues in excess of \$500,000 and, during that same period, provided equipment-rental services valued in excess of \$50,000 for customers located within the State of New Mexico and also provided equipment-rental services valued in excess of \$50,000 at other of its facilities to customers located outside the State of New Mexico. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

**3. Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

**4. Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

**5. Unit Finding:** The primary issue presented in this case is whether a unit comprised of mechanics, drivers, yard persons, and parts associates is appropriate. To provide a context for my discussion of this issue, I will present background facts regarding the Employer's operations, followed by a description of the duties and responsibilities of the classifications and commonly shared terms and conditions of employment. I will then present the case law and the reasoning behind my conclusions on the issues presented. There is no history of collective bargaining in the unit, which is the subject of these proceedings. However, in an election held on May 31, 2002, in Case 28-RC-6068, the same parties had stipulated to a unit for the same Albuquerque facility, which included the dispatcher and senior yard person, but which excluded the sales coordinators and senior sales coordinator.

#### **A. Employer's Operations**

The Employer is engaged primarily in the rental of equipment to individuals and companies. The equipment ranges from small electric tools, drills, and lawn mowers, to large 50,000-pound excavators and loaders. The Employer also offers for sale all of the products it offers for rent, both new and used, and also services and repairs equipment for the public.

The Employer's facility covers 60,000 to 70,000 square feet, 10,000 square feet of which are occupied by a building. The rest of the facility consists of a parking lot and a yard, where the larger equipment is stored. The building can be divided into three sections: the shop area, where the mechanics and some of the yard persons work; the offices and indoor storage facilities; and the showroom/counter area, where the Employer displays smaller equipment and where employees complete rentals and sales at the counter area. The shop

area consists of six service bays and a wash bay, where equipment is washed before being serviced. Yard persons exclusively use the first bay to service equipment, check oil and gas, and change oil. The rest of the bays are used by mechanics to service and repair equipment. The facility is open Monday through Friday from 6:30 a.m. to 5:00 p.m. and Saturdays from 7:00 a.m. to 12:00 noon. The Employer serves the entire State of New Mexico and delivers equipment throughout the State.

The record indicates that there are two primary ways that customers rent or purchase equipment: visits or call-ins. The first involves customers who visit the facility and place their order with a counter person. Most of the time a sales coordinator takes the order and immediately calls a yard person through a two-way radio and asks that the yard person get the equipment ready. Sometimes a yard person may approach customers as they arrive at the facility and get the information as to what equipment the customers are looking for before sending them to the showroom to have their contract written. After finding the equipment and making sure it is ready for rent, the yard person calls back to the counter person with the unit number. In the meantime, the counter person fills out the rental agreement or sales contract and has the customer sign the contract.

The second method is by call-ins. Either the customers or one of the Employer's outside sales persons can call in the orders. The counter persons take down those orders just as if the customer had visited the facility. In either case, the customer has the option of picking up the equipment or having the Employer deliver the equipment to the customer's designated location. If the customer is at the facility, the customer takes the executed rental agreement to a yard person who, after reviewing it, brings the equipment to the customer, shows the customer how to use the equipment, and helps load the equipment into the customer's vehicle. On busy days, some of the counter people might look for the equipment themselves, explain the equipment's use to the customers, and help load the equipment into the customer's vehicles. A customer who asks that the equipment be delivered signs the sales or rental contract at the time the equipment is delivered.

Regional Manager Michael Anthony Meis oversees Employer's Albuquerque facility. Working under Meis are Branch Administrator Debbie Winter and Service Manager Bruce England, who was released by the Employer during the hearing. The parties stipulated, and I find, that Meis and England are salaried supervisors to whom employees report, that Winter is classified as a clerical employee, and that all of these individuals should be excluded from the unit found appropriate herein.

There are four outside sales persons who work out of the Albuquerque facility. Outside sales persons spend most of their time soliciting orders from customers before calling those orders in to sales coordinators. They spend very little time working at the facility, except when working the counter one Saturday per month. Outside sales persons are paid salary plus commission and report directly to the branch manager. Outside sales persons do not participate in either of Employer's two profit sharing plans: Branch Achievement Plan and Annual Performance Bonus. The Branch Achievement Plan is tied to safety since the Employer's experience demonstrates most accidents happen in the shop, the yard, and while driving. The Annual Performance Bonus is primarily tied to the facility's profitability.

Outside sales persons do, however, participate in what is referred to as the “spiffs” program that gives employees points based on quarterly revenue figures of the facility. Employees that participate in the program use the points to purchase goods through a catalogue. On Saturdays, the outside sales persons help the sales coordinators with rentals and sales. Moreover, on Saturdays, outside salespersons, along with the sales coordinator working that Saturday, run the facility in the absence of the branch manager. The parties stipulated, and I find, that the outside salespersons should be excluded from the unit because they do not share a community of interest with other employees in the unit.

## **B. Job Classifications Parties Agree Should be Included in the Unit**

### **1. Mechanics**

The cycle of activity associated with repairing a piece of equipment begins when it is returned to the facility. Yard persons place the equipment in either the service line or in the repair line, depending on whether the equipment was returning with known problems. Equipment in the service line only needs to have the oil, fluid levels, and functions checked before the equipment is rated as ready for rental. Yard persons perform some of the servicing that does not require the skills of a mechanic. They work out of the first bay. Upon completion of the servicing or repair, the mechanic fills out a ready to rent tag that is attached to the equipment.

Eight mechanics work for the Employer. They are divided into three levels based on their experience: mechanic I’s; II’s; and III’s, with mechanic I’s being the most experienced. Two of three mechanics I’s are referred to in the record as field service mechanics, because they travel from jobsite to jobsite repairing equipment away from Employer’s facility. Both field service mechanics work out of company service trucks that they drive home at night. Mechanic I’s do not need any level of supervision in making most repairs. The facility employs three mechanic II’s and one mechanic III, all of whom work in the shop alongside the other mechanic I. Each mechanic works at one of the remaining five bays. All mechanics report to the service manager and the branch manager.

Mechanics at the facility occasionally wash equipment in the wash bay alongside yard persons. They also occasionally field questions from customers that neither counter persons nor yard persons can answer. All mechanics wear company uniforms together with free laundry service for those uniforms.

Mechanics work from 6:30 a.m. to 5:00 p.m. The mechanics receive one hour for lunch and are scheduled for two 15-minute breaks, one in the morning and one in the afternoon. They are paid on an hourly basis and participate in the Branch Achievement Plan, which, as noted above, is based on safety.

### **2. Parts Associate**

The parts associate is in charge of ordering parts, receiving parts, and keeping stock of parts that may be needed for repair and service of equipment. The parts associate closes work

orders after he receives reports from mechanics concerning amount of time spent on specific equipment and the parts used on the equipment. The parts associate then either bills internally, if the Employer owns the equipment, or bills the customer that requested the repair. He works out of an office and is rarely in the shop. The record reflects that while the parts associate does not wear a uniform, he may be subject to a dress code. Like the mechanics, the parts associate is paid on an hourly basis, reports to the service manager, and participates in the Branch Achievement Plan.

### **3. Yard Persons**

Yard persons work throughout the facility's extensive yard area, the wash bay, and the first bay of the shop. Their primary duties include loading and unloading equipment in or onto both drivers' and customers' vehicles; arranging the yard; finding equipment in the yard; reporting to the counter people the respective equipment number; demonstrating equipment to customers; washing equipment; and doing minor service on equipment, such as changing oil, checking fuel, and filling up equipment with gas or diesel fuel.

Yard persons cannot write contracts and seldom go to the showroom. Although the record is unclear as to computer access, it appears that none of the three yard persons uses the Employer's computers. Like the mechanics, yard persons wear uniforms. All yard persons report to the senior yard person and the branch manager.

Yard persons work from 6:30 a.m. to 5:00 p.m. Like mechanics, yard persons receive one hour for lunch and are scheduled for two 15-minute breaks, one in the morning and one in the afternoon. They also participate in the Branch Achievement Plan

### **4. Drivers**

The primary duties of drivers include delivering and picking up equipment from customers. Three of the five drivers have a commercial drivers license A and drive tractor-trailers. Each morning they report to the dispatcher who tells them what each driver needs to deliver. Drivers load the equipment onto their trucks and make the deliveries. At those jobsites, drivers also load and unload equipment and demonstrate its use, thus performing the same job duties as yard persons. Sometimes drivers are required to fuel the equipment. If the customer did not sign the contract when placing the order, the driver makes sure the customer signs the contract. Before completing a delivery or pick-up, a driver will call the dispatcher and ascertain what the driver should do after the delivery or pick-up is completed. Although general instructions are given to the drivers as to deliveries and pick-ups each morning, the record indicates that the schedule is constantly changing throughout the day as the driver communicates with the dispatcher.

Drivers are scheduled to work from 6:30 a.m. to 5:00 p.m., although they often work overtime past 5:00 p.m. Like mechanics and yard persons, drivers wear uniforms, are paid at an hourly rate, and participate in the Branch Achievement Plan.

## **C. Job Classifications Whose Inclusion in the Unit is in Dispute**

### **1. Sales coordinators**

Sales coordinators, also known as inside sales persons or as sales associates, work the counters and, except for Becky Johnson, are assigned to work a specific computer terminal. They coordinate sales coming in from either the outside sales persons or the customers calling in or walking into the facility. Sales coordinators use the computer to write rental and sales agreements and to complete reservation cards, if the customers want the equipment delivered. While completing a contract, sales coordinators call yard persons over two-way radios to check on the particular equipment requested and to record the unit number.

When the yard persons are busy, some of the sales coordinators may go into the yard to look for the equipment themselves and may also load the equipment into the customers' vehicles. Two of the three sales coordinators have forklift training. One of the sales coordinators, Corrina Velasquez, never works in the yard or in the mechanic shop. Tom Fraide, another sales coordinator, visits the mechanic shop about four or five times per day to check tires, as he places orders with an outside tire company. On some occasions Fraide helps out the yard persons.

Becky Johnson, the third sales coordinator, is primarily in charge of ordering new merchandise and selling merchandise as opposed to renting it. Johnson also makes sure the showroom is well stocked. She goes to the yard only to receive delivery of her orders and to move her new merchandise using a forklift. Sometimes some of the yard persons help her move the new merchandise around the facility. Johnson does not work the counter as much as the other two sales coordinators and the senior sales coordinator. Unlike the other two sales coordinators, Johnson does not work out of a particular computer when working the counter. A document made by the branch manager and labeled "Counter Responsibilities" outlines the most important duties of the counter people. The document fails to include Johnson, although it names the other two sales coordinators, the senior sales coordinator, and the dispatcher who spends half of his time working the counter. The dispatcher does not consider Johnson to be a sales coordinator and at the hearing pointed out that she does not start work at 6:30 a.m. as the rest of the sales coordinators. Johnson makes her own hours, according to the branch manager.

The Employer urges that the sales coordinators are fully integrated into the facility's function. It points out that two of the three sales coordinators are often in the yard and that their official job duties include checking out and demonstrating equipment and assisting customers in loading and unloading equipment. However, one of the sales coordinators never works in the yard and the "Counter Responsibilities" document fails to mention those duties.

The sales coordinators are paid on an hourly basis and participate in the Annual Performance Bonus, the profit sharing plan described above. Sales coordinators also participate in the "spiffs" program, as do the outside sales persons. Unlike the drivers, yard persons, or mechanics, the sales coordinators have keys to the building and are not required to

wear uniforms. The sales coordinators perform the duties of the dispatcher when neither the dispatcher nor the senior sales coordinator is available.

## **2. Senior Sales coordinator**

The senior sales coordinator performs essentially the same duties as the sales coordinators described above. The person who currently works as the senior sales coordinator formerly worked both as a dispatcher and as a driver for the Employer. He holds a commercial drivers license A and sometimes delivers equipment when the facility is short on drivers.

In addition to participating in the Annual Performance Bonus and the “spiffs” program, the senior sales coordinator was awarded additional money under an incentive that rewarded him for reducing re-rentals. The senior sales coordinator is in charge of the facility whenever the branch manager is unavailable.

## **3. Dispatcher**

The dispatcher analyzes deliveries and pick-ups of equipment. Each morning the dispatcher meets with the drivers and instructs them what needs to be loaded in each truck. He gives the corresponding paperwork to the drivers and afterwards tells the drivers where they need to go. The record indicates that because priorities and orders are constantly changing, the dispatcher often changes a driver’s itinerary. It does not appear that the dispatcher follows any guidelines in distributing work among the drivers.

The dispatcher spends about half of his time working the counter along with the other sales coordinators. He has a computer terminal assigned to him. Whenever a driver calls in sick or is on vacation, the dispatcher, who worked as a driver and holds a commercial drivers license A, drives the absent driver’s truck and either the senior sales coordinator or a sales coordinator takes over dispatching.

Drivers inform the dispatcher when they will be absent so that the dispatcher may work around their absence. According to the Employer, the dispatcher does not approve requests for time off. The record indicates, however, that the dispatcher has approved time off. A driver who previously held the dispatch position disciplined a driver while being a dispatcher. William Downey, the former dispatcher before being promoted to senior sales coordinator, signed under “Supervisor’s Signature” written evaluations of four drivers while working as a dispatcher.

The dispatcher works out of an assigned computer in the counter area and out of the dispatcher’s office. The dispatcher is paid on an hourly basis and participates in the Branch Achievement Plan along with the drivers, yard persons, and mechanics. However, the dispatcher also participates in the “spiffs” program along with the sales coordinators and senior sales coordinator, outside sales persons, and branch manager. The dispatcher does not wear a uniform, although he is subject to the unofficial dress code applicable to the parts associate.

#### **4. Senior Yard Person**

The senior yard person performs essentially the same duties as the yard persons described above. According to the record, yard persons report to the senior yard person, who directs and assigns their work. Yard persons notify the senior yard person when they will arrive late. The senior yard person creates the lunch schedule for all the yard persons and sets up the Saturday rotation for yard persons. In the hiring process, the senior yard person interviews a yard person candidate before a final interview with the branch manager. One of the mechanics testified that after the service manager was released, which took place after commencement of the hearing, the senior yard person told the mechanics that he would be guiding them while a new service manager is hired.

The record reveals that between June 24, 2002, and May 30, 2003, the senior yard person signed under “Supervisor’s Signature” 10 disciplinary notices issued to yard persons, suspended one of the yard persons, and also signed under “Supervisor’s Signature” a vacation/sick leave form for one of the yard persons.

The senior yard person is paid on an hourly basis and participates in the Branch Achievement Plan along with the drivers, yard persons, mechanics, and dispatcher. The senior yard person wears a uniform and reports to the branch manager.

#### **D. Other Factors Related to the Job Classification**

Except for the parts associate, all the employees in the petitioned-for unit, which includes drivers, mechanics, and yard persons, provide manual labor for the Employer. They clean, maintain and repair, load and unload, and deliver equipment for the Employer. They work in the yard, mechanic shop, or on the road. They participate in a profit sharing plan based primarily on safety, as opposed to the profit sharing plan based on branch profitability, and do not participate in the “spiffs” program. Except for the parts associate, all employees in the petitioned-for unit are the only facility employees required to wear uniforms.

Apart from working in the yard, yard persons work inside the mechanic shop, in both the first bay and the wash bay. Some of the mechanics travel to the jobsites to repair equipment, the same jobsites where drivers deliver and pick-up equipment.

Although the dispatcher helps load equipment in the yard and covers when a driver is out, he is still in charge of the drivers and is responsible for assigning, directing, and distributing their work. Some of the sales coordinators also help load and unload equipment and explain the equipment’s use to customers. However, the record indicates that sales coordinators spend most of their time working inside the facility. Only two sales coordinators spend any time in the yard performing the same duties as yard persons, one of them being the senior sales coordinator. The yard persons, mechanics, and drivers do not perform any of the duties performed by the sales coordinators while inside the facility.



The Employer contends that all employees have access to the computer system; however, the bulk of the employees in the petitioned-for unit never use the computer. Moreover, only the sales coordinators, senior sales coordinators, and the dispatcher can write sales and rental contracts, which requires the use of a computer.

Lastly, the record indicates that there has been some employee movement, chiefly from mechanic to sales coordinator and from driver to dispatcher to sales coordinator. Apparently working the counter leads to the assistant branch manager position or the outside sales position. Positions are not interchangeable. A driver who at one time was promoted to dispatcher went back to being a driver, because he could not handle the additional skills required to dispatch or work the counter.

### **E. Legal Analysis and Determination**

Section 9(b) of the Act provides that “the Board shall decide in each case whether to assure to employees fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof.” It is well established under Board law that the Act does not require the unit for bargaining be the optimum, or most appropriate unit, but only an appropriate unit. *Home Depot USA*, 331 NLRB 1289, 1290 (200); *Overnight Transportation Co.*, 322 NLRB 723 (1996). An appropriate unit insures to employees “the fullest freedom in exercising the rights guaranteed by the Act.” *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), enfd, 190 F. 2d 576 (7<sup>th</sup> Cir. 1951); *Dinah’s Hotel and Apartments*, 295 NLRB 1100 (1989). A union is not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with the requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103 (1962). Furthermore, in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit.

In determining whether a petitioned-for unit is an appropriate unit, the Board addresses whether the employees share a community of interest. *Home Depot USA, Inc.*, 331 NLRB at 1290; *The Boeing Company*, 337 NLRB No. 24 (2001). In *Home Depot USA, Inc.*, supra, at 1291, the Board stated that factors it considers in determining community of interest among different groups of employees include:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; differences in job functions and amount of working time spent away from the employment or plant sites...the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining [*Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962)].

No one of the above factors has controlling weight and there are no per se rules to include or exclude any classification of employees in any unit. *Airco, Inc.*, 273 NLRB 348 (1984).

Applying the factors relating to community of interest, I find that those classifications in the petitioned-for unit share a strong community of interest with one another. In reaching this conclusion I rely on the fact that all employees in these classifications perform manual labor needed to distribute, service, and maintain the rental equipment. Moreover, the Board has held that a unit consisting of yard employees, mechanics, and delivery personnel, but excluding counter and customer service personnel constitutes an appropriate unit. See *Avis Rent-a-Car System, Inc.*, 132 NLRB 1136 (1961).

### **1. Sales Coordinators and the Senior Sales Coordinator Do Not Share a Community of Interest with the Other Employees**

Applying the community of interest factors cited above, the sales coordinators and the senior sales coordinator do not share a community of interest with the other employees. First, the record reveals little contact with other employees. The sales coordinators, including the senior sales coordinator, spend the bulk of their time working the counter. The employer in *United States Steel Corp.*, 192 NLRB 58 (1971), a case relied upon by the Employer, argued that the only appropriate unit should include technical employees at the employer's research and development plant in addition to the maintenance employees the union sought to include. In *United States Steel* there were numerous instances where technical and maintenance employees worked side by side in various aspects of design, construction, maintenance, and repair of experimental equipment. In contrast, the contact between sales coordinators and those in the petitioned-for unit only extends to the sales coordinators calling on a two-way radio to the yard persons to ready certain equipment and the yard persons calling back with a unit number.

Second, the record also reveals a lack of integration with the work function of other employees. The petitioned-for employees repair, drive and demonstrate equipment instead of writing contracts and taking orders over the phone. Apart from the brief conversation over the two-way radio, drivers, mechanics, and yard persons perform all their duties without any assistance from the sales coordinators. The sales coordinators perform very few of the duties performed by the petitioned-for unit, whereas there is no indication that the petitioned-for employees perform any of the primary counter responsibilities of sales coordinators. Also, the only evidence of interchange, that two of the four sales coordinators occasionally help load and unload equipment and deliver equipment, is not sufficient as to require the inclusion of the sales coordinators into the petitioned-for unit. See *Budget Rent-A-Car of New Orleans, Inc.*, 220 NLRB 1264 (1975).

Third, the record reveals that other employees receive different benefits, perform different tasks, and exercise different skills than sales coordinators. The employees in the petitioned-for unit participate in a different profit sharing plan, based on safety, as opposed to the other plan, based on profitability.

Fourth, the employees in the petitioned-for unit utilize specialized skills in repair and service of different kinds of equipment, and, if driving, different kinds of vehicles, whereas many of them do not possess the computer skills required by the other employees. *Glosser Bros., Inc.*, 93 NLRB 1343 (1951), a case relied by the Employer, is distinguishable. In *Glosser Bros.*, the petitioner sought a unit consisting of employees of one of 60 departments in a department store. In that case all employees in the department store received the same benefits, exercised the same skills, and performed the same or similar tasks. Here, employees in the petitioned-for unit exercise different skills than the sales coordinators. Moreover, the petitioned-for unit employees receive different benefits, perform different tasks than the sales coordinators, do not have access to the building keys, and are subject to different supervision. Mechanics work under the direct supervision of the service manager, while yard persons work under the direct supervision of the senior yard person and the drivers under the direct supervision of the dispatcher. None of these individuals supervises the sales coordinators.

Contrary to the Employer's position and for the reasons set forth above, I find that the unit sought is not an arbitrary, a heterogeneous, or an artificial grouping of employees. I find *Moore Business Forms, Inc.*, 204 NLRB 552 (1973), cited by the Employer, is distinguishable. In *Moore Business Forms*, the employees who were the subject of the petition worked in the same work area, a manufacturing plant, as the employees whom the employer sought to include, shared the same supervision, and entered the different categories of employment with the same level of experience. In contrast, the petitioned-for employees do not share the same supervision with the sales coordinators; they do not remain in the same work area, but rather vary their work assignments among the yard, the mechanic's shop, and the road; they do not work in the area where the sales coordinators employees work; and finally, the record does not indicate that they are required to have specialized skills at the time they enter their respective job descriptions, as do the sales coordinators.

Accordingly, and for the reasons set forth above, I shall exclude the sales coordinators, including the senior sales coordinator, who performs essentially the same duties as sales coordinators, from the unit based on lack of community of interest. The Petitioner has also sought to exclude the senior sales coordinator based on its contention that he is a supervisor under the Act. However, based on my conclusion that the senior sales coordinator does not share a sufficient community of interest with those employees in the petitioned-for unit and should be excluded on this basis, I need not decide whether the senior sales coordinator is also a supervisor within the meaning of the Act.

## **2. Dispatcher and Senior Yard Person are Statutory Supervisors**

Section 2(11) of the Act defines the term "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

exercise of such authority is not of merely routine or clerical nature, but required the use of independent judgment.

The possession of any of these authorities is sufficient to deem the individual invested with such authority a supervisor. *Allen Services Co.*, 314 NLRB 1060 (1994). Section 2(11) is to be read in the disjunctive and “the exercise of authority (requiring independent judgment) with respect to any of the actions specified is sufficient to confer statutory status.” *Queen Mary*, 317 NLRB 1303 (1995); *Providence Hospital*, 320 NLRB 717, 725 (1996).

The Board has a duty not to construe this statutory language too broadly because the individual found to be a supervisor is denied the rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress emphasized its intention that only supervisory personnel “vested with genuine management prerogatives should be considered supervisors, and not straw bosses, leadmen, set up men, and other minor supervisor employees.” *Ten Broek Commons*, 320 NLRB 806, 809 (1996); accord *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), enf’d in relevant part, 794 F.2d 527 (9<sup>th</sup> Cir. 1986). As stated in *Davis Memorial Goodwill Industries*, 318 NLRB 1044, 1048 (1995), “[a]pplying Section 2(11) to the duties and responsibilities of any given person required the Board to determine whether the person in question has authority to use independent judgment on matters that are less than routine in performing any of the functions listed in Section 2(11) and to do so in the interest of management.” Where “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisor status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The party seeking to exclude a person from voting for a collective-bargaining representative has the burden of establishing that the person is ineligible to vote. *Davis Memorial Goodwill Industries*, supra; *St. Francis Medical Center West*, 323 NLRB 1046 (1997); *Bozeman Deaconess Hospital*, 322 NLRB 1007, fn. 4 (1997), citing *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1445 (9<sup>th</sup> Cir. 1991), enfg. 288 NLRB 991 (1988). In other words, “in representation proceedings such as this, the burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists.” *Ohio Masonic Home*, 295 NLRB 390, 393 (1989), citing *Tucson Gas & Electric*, 241 NLRB 181 (1979). Here, the burden rests on the Petitioner.

Applying this legal standard, I find that the record amply demonstrates that both the dispatcher and the senior yard person are supervisors under the meaning of the Act. First, as to the dispatcher, the record shows that within the past year and a half, persons who have held the position of dispatcher, including the person that currently holds the dispatcher position, have submitted written evaluations of the drivers which are used to determine wage increases and participation in the profit sharing plan, thus affecting terms and conditions of employment of the driver. The dispatcher submits the employee evaluations based on his observations and assessments of the employees’ conduct and performance in relation to what is expected by the Employer.

The record indicates that the dispatcher, using his independent judgment in the interest of the Employer, assigns and directs the work of the drivers. Specifically, the dispatcher assigns work to drivers, and in the process, has the authority to grant overtime and has approved time off. These factors are sufficient to confirm supervisory status. *Grove Truck & Trailer*, 281 NLRB 1194, 1203 (1986); *Dixon Industries*, 247 NLRB 1446, 1450 (1980).

The Employer cites *NLRB v. Neeman Oil Co.*, 139 F.3d 311 (2<sup>nd</sup> Cir. 1988), to support its argument that the dispatcher is not a supervisor, because he is merely directing the flow of goods. However, the dispatchers at issue in *Neeman Oil* did not exercise independent judgment, where the employer provided detailed procedures for assigning work and, for some of the dispatchers, computer generated delivery tickets already grouped the assignments geographically. In contrast, the record here indicates that there are no specific guidelines the dispatcher must follow. Rather, he must exercise his judgment in giving priorities to deliveries and in scheduling pick-ups and deliveries throughout the day.

I also rely on the fact that the dispatcher spends about half of his time working the counter with the sales coordinators, whom I have excluded, based on their lack of community of interest with those who are in the petitioned-for unit. This provides an additional basis on which I will exclude him from the unit I have found appropriate.

Turning to the senior yard person, I shall exclude him from the unit based primarily on the record evidence which establishes that he has issued 10 written disciplinary notices and in one case has suspended an employee based on his observation and assessment of the employee's conduct and performance in relation to what is expected by the Employer, without first seeking the approval or authorization of a superior. It is well established that an individual who possesses such authority is a statutory supervisor. *Tree-Free Fiber Co.*, 328 NLRB 389, 392 (1999) (citing *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993)); *Superior Bakery*, 294 NLRB 256, 262 (1989). In addition, I shall exclude the senior yard person because of his secondary indicia of supervisory status, including the statement made by him to the mechanics that he would be guiding them until a new service manager is hired.

Based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time drivers, mechanics, and yard persons employed by the Employer at its facility located at 2800 University Avenue, Albuquerque, New Mexico.

**Excluded:** Branch manager, branch administrator, service manager, dispatcher, senior yard person, sales coordinators and senior sales coordinator, office clerical/administrative employees, outside sales persons, professional employees, guards, and supervisors as defined in the Act.

There are approximately 16 employees in the bargaining unit found appropriate herein.

### **DIRECTION OF ELECTION**

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

### **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 953, AFL-CIO**

### **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Region 28 Resident Office, 505 Marquette Avenue, NW, Suite 1820, Albuquerque, New Mexico, 87102, on or before August 15, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

## **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by August 21, 2003. A copy of the request for review should also be served on the undersigned.

Dated at Phoenix, Arizona, this 7<sup>th</sup> day of August 2003.

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Cornele A. Overstreet, Regional Director  
National Labor Relations Board - Region 28

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